Commentary

On Placing Property Due Process Center Stage in Takings Jurisprudence

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Most decisions of the Supreme Court that date well back in time enjoy unquestioned interpretation. Not so *Pennsylvania Coal Co. v. Mahon*,[1] decided in 1922. Holmes' opinion for the Court has been the subject of attack from the moment of its pronouncement. It is the thesis of this Commentary that the critics, on and off the High Bench, have consistently failed to grasp the genius of Holmes in his masterful exposition of the constitutional principles that controlled the decision. Understanding the Holmes opinion would properly place due process considerations center stage in the jurisprudence of "takings." That two-thirds of a century have now intervened since this seminal decision is no justification for allowing the matter to drop. Constitutional issues are never settled until correctly resolved.

I. FACTUAL BACKGROUND

Pennsylvania Coal presented no complexity on its facts. A deed executed by the coal company in 1878 had conveyed to the Mahons the surface rights in a plot located in the city of Scranton, but had expressly reserved the right to remove all coal underneath. The grantees waived all claims for damages for subsidence that might arise from mining out the coal. Taking advantage of the savings in cost thereby realized, the Mahons constructed a residence on the land thus acquired. When mining operations neared the premises the coal company gave timely notice of its intent to mine under the house. Thereupon, in reliance on the Kohler Act of 1921,[2] the Mahons instituted an action to prevent mining in such a way as to remove supports and cause a subsidence of the surface and house. The company's answer was that the Act, in taking from the company the rights established by the contract, was unconstitutional. The Pennsylvania courts granted the relief sought, holding the law to be a legitimate exercise of the State's police power.

On appeal, the Supreme Court reversed in an opinion by Justice Holmes. The essence of his reasoning was this:

> Government hardly could go on if to some extent values incident to property could not be diminished without paying for every such change in the general law. As long recognized some values are enjoyed under an implied limitation and must yield to the police power. But obviously the implied limitation must have its limits or the contract and due process clauses are gone.[3]

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1. 260 U.S. 393 (1922).

2. The Kohler Act forbade the mining of coal in such a way as to cause subsidence of, *inter alia*, any structure used for human habitation. Thus, the legislation destroyed the previously existing contract rights of the defendant concerning the property. *Id.* at 412–13.

3. *Id.* at 413.

Therefore, "if regulation goes too far it will be recognized as a taking"[4] and invalidated. However, this result will not prevent realization of "a strong public desire to improve the public condition"; there is always available "the constitutional way of paying for the change."[5]

II. Two Projections in Constitutional Exegesis

The Holmes opinion in *Pennsylvania Coal* is premised on two fundamental propositions of constitutional dimension, centering on the due process of law guaranteed in the fifth amendment against federal breach and in the fourteenth amendment against similar offense by a state.

The first of these propositions is that the police power inherent in government is not limitless. The genius of the American Constitution lies in its effective offset of power and limitation. It is the office of historic due process to determine when an exercise of government power, whether in the name of the public health, public morals, public safety, or even the public welfare, has gone to such extreme as to remove all content from the substance of private property. When this is manifest, the power of police, to employ Holmes' phrase, has "gone too far." The enactment at this point is unconstitutional because an unlawful taking has occurred.

Justice Brandeis dissented on one of the few occasions in which he and Justice Holmes differed in result on a constitutional issue. For Brandeis it was true that

> [e]very restriction upon the use of property imposed in the exercise of the police power deprives the owner of some right theretofore enjoyed, and is, in that sense, an abridgement by the State of rights in property without making compensation. But restriction imposed to protect the public health, safety or morals from dangers threatened is not a taking.[6]

Brandeis' error was his assumption that *no* exercise of the police power can constitute a taking that triggers constitutional limitation by operation of due process. The Justice deduced this erroneous view from the decision in *Mugler v. Kansas*,[7] in which the elder Justice Harlan, for a unanimous Court, had sustained a state law forbidding the manufacture and sale of intoxicating liquor. The explanation for the holding was that a "prohibition simply upon the use of property for purposes that are declared, by valid legislation, to be injurious to the health, morals, or safety of the community, cannot, in any just sense, be deemed a taking or an appropriation of property for the public benefit."[8]

On its face this statement is not inconsistent with Holmes' thesis, for if the legislation is a *valid* exercise of the police power a balance between power and limitation has been struck and the enactment a fortiori satisfies due process. However, Justice Harlan gave no indication of such balancing; his use of the modifier must have been intended only to express his judgment that the law was unquestionably directed at the state's concern with community health, safety, or morals. This

4. *Id.* at 415.
5. *Id.* at 416.
6. *Id.* at 417.
7. 123 U.S. 623 (1887).
8. *Id.* at 668–69.

concept of validity leaves the police power without limit, save only to provide protection of property interests where the legislature professes concern for the public interest as a camouflage for outright attack on the institution of private property. That Justice Holmes took this view of the passage explains his subsequent remark to Harold Laski that "I always have thought that old Harlan's decision in *Mugler v. Kansas* was pretty fishy."[9]

Having been led astray by Harlan's reasoning in *Mugler*, thereby concluding in *Pennsylvania Coal* that there had occurred no unconstitutional taking, Justice Brandeis was not required to face the consequences of a holding of unlawful taking. Nor, technically, was Justice Holmes, beyond entering judgment for the coal company, because the Mahons' claim for relief collapsed with the conclusion that the Kohler Act, by going too far in its attempted destruction of rights in minerals obtained by lawful contract, had run afoul of the constitutional limitation pregnant in due process of law.

However, by referring to "the constitutional way of paying for the change"[10] sought by the Pennsylvania legislature, Justice Holmes made it clear that an offending government need not subsequently abandon its assault upon proprietary rights but could opt to pay just compensation to achieve its desire, provided that its objective comports with the requirement that the contemplated use of the private property thus obtained be for a public purpose. The "constitutional way" could be a reference only to the taking clause—express in the fifth amendment along with due process and, twenty-five years before *Pennsylvania Coal*, incorporated by reference into the due process clause of the fourteenth amendment.[11]

The taking proviso in the Constitution is a model of clarity: "nor shall private property be taken for public use, without just compensation."[12] It is *solely* a declaration of the condition on which a federal or state government can lawfully proceed if a decision is made to pursue an objective sought by otherwise invalid action. Determination that an invalid taking has occurred is the office of the associated due process clause. This is Justice Holmes' second fundamental proposition in *Pennsylvania Coal Co. v. Mahon.* Due process determines whether there has been an unconstitutional taking; the taking clause measures the dollar cost to the public of any adjudged expropriation. There is no indication whatsoever in the Holmesian synthesis that the taking clause functions to resolve the issue of taking. Whether government has "gone too far" is a matter to be determined by the interaction of police power and due process limitation.

The twin insights of the incomparable Holmes make *Pennsylvania Coal Co. v. Mahon* one of the seminal landmarks of the Supreme Court in constitutional adjudication. They place property due process at center stage in takings jurisprudence, where correctly it ought to be. Unfortunately, lesser minds on and off the Court have failed to grasp the constitutional design unfolded for them by Holmes.

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9. 1 HOLMES-LASKI LETTERS 473 (M. Howe ed. 1953).
10. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).
11. Burlington & Quincy R.R. v. Chicago, 166 U.S. 226 (1897).
12. U.S. CONST. amend. V.

Characteristically, those unable to comprehend the design criticize the master rather than lay the blame at the feet of their own incompetence.[13] The unhappy result has been continuing misunderstanding that has not been cleared up in two-thirds of the century.

Even while Justice Holmes remained on the Court there were signs that other Justices did not get the message. The case in point was *Miller v. Schoene*,[14] sustaining the Cedar Rust Act of Virginia which empowered the state entomologist to cut down, within two miles of any apple orchard, all red cedars on private property either actually or potentially infected with cedar rust "balls." Red cedars were host to a parasite which in springtime released spores that, carried by the wind, infected both blossoms and leaves of most varieties of apple trees. The first effect was a stunting of fruit growth, followed by a killing of the tree by defoliation. Apple production in the Shenandoah Valley had become a major industry, and losses to orchardists would put a heavy burden on the economy of Virginia. The Millers, who owned property within the two-mile limit, challenged the destruction of their ornamental red cedars as a violation of due process, but lost in the Supreme Court by a unanimous opinion.

Full analysis of the pertinent facts in this litigation confirms the uniform reaction of the Justices that, in this case, there was nothing close to an invalid taking in the uncompensated removal of the offending red cedars; rather, it was one of those situations where B was only being protected from A, not benefiting at the expense of A. Virginia's law permitting destruction withstood the charge of invalidity on these facts.

The opinion, however, was unnecessarily broad. It was written by a newcomer fresh from a prestigious position in academe, Harlan Stone, who had had no direct involvement with the underlying issue in *Pennsylvania Coal*. Possibly, he was affected by the criticism of Holmes' view that prevailed in the interim among various erudites;[15] or, he may have been tempted by the propitious occasion to indulge the common frailty of shallow scholarship. In any event, perhaps, he was too new on the judicial scene to have plumbed the depths of the constitutional issue presented.

Whatever the explanation, the new Justice topped off the opinion of the Court with a great flourish: "And where the public interest is involved preferment of that interest over the property interest of the individual, to the extent even of its destruction, is one of the distinguishing characteristics of every exercise of the police power which affects property."[16] If the elder Harlan's opinion in *Mugler* was "pretty fishy," that of Stone in *Schoene* was equally so.

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13. F. BOSSELMAN, D. CALLIES, & J. BANTA, THE TAKING ISSUE chs. 8, 12 (1973). Note especially the odd explanation of the holding of *Pennsylvania Coal* attempted by Laurence Tribe, in L. TRIBE, AMERICAN CONSTITUTIONAL LAW 444 (1978).

14. 276 U.S. 272 (1928).

15. Dean Acheson had favored the Brandeis position in an unsigned editorial in NEW REPUBLIC, Jan. 3, 1923, at 136.

16. Miller v. Schoene, 276 U.S. 272, 279–80 (1928) (note the qualification: "which affects property.").

Why did Holmes not concur, countering this veiled assertion that where property interests are involved the police power is limitless? Did Holmes nod? Surely not. Rather, he must have felt it was not worth the effort to instruct the Brethren in sound constitutional principle where decision of the case at bar would not be different for his endeavor. If any would listen, understanding would be available in his contemporaneous dissent in *Springer v. Philippine Islands*.[17]

Springer involved what was becoming a hotly debated issue concerning separation of powers under the United States Constitution. The territorial legislative assembly of the Philippines, in creating a national bank and a national coal company, vested the voting power of government shares in each enterprise in a committee, consisting of the Governor-General, the President of the Senate, and the Speaker of the House. In an election in which the Governor-General refused to participate, the other two officers cast their votes. In actions in the nature of quo warranto, the Governor-General challenged the underlying legislation as unconstitutional under the Organic Act of the Philippine Islands, which paraphrased the American Constitution in vesting legislative power in a two-house assembly and executive power in the Governor-General. A majority of the Supreme Court affirmed a judgment of ouster entered by the supreme court of the territory.

Justice Holmes, in disagreement, opened his dissent with the following paragraph that is strikingly reminiscent of his exposition in *Mahon* as regards the relationship between police power and due process.

> The great ordinances of the Constitution do not establish and divide fields of black and white. Even the more specific of them are found to terminate in a penumbra shading gradually from one extreme to the other. Property must not be taken without compensation, but with the help of a phrase [the police power], some property may be destroyed for public use without paying for it, if you do not take too much. When we come to the fundamental distinctions it is still more obvious that they must be received with a certain latitude or our government could not go on.[18]

Holmes then turned to the issue before the Court as involving another instance of constitutional balance, the relationship among the three departments wielding governmental power. After reviewing numerous decisions of the Court tolerating slippage from strict adherence to the separation principle, he concluded

> that however we may disguise it by veiling words we do not and cannot carry out the distinction between legislative and executive action with mathematical precision and divide the branches into watertight compartments, were it ever so desirable to do so, which I am far from believing that it is, or that the Constitution requires.[19]

The conclusion followed that nothing had occurred to justify relief by way of ouster.

It is recorded that Justice Brandeis "agrees with this opinion."[20] This does not necessarily mean, however, that he agreed with the first paragraph; his agreement may have been only with Holmes' conclusion with respect to the separation of powers

17. 277 U.S. 189 (1928).
18. *Id.* at 209–10.
19. *Id.* at 211.
20. *Id.* at 212.

issue at hand. Yet he did not so limit himself, nor did he note his concurrence only in the judgment. There is therefore basis for concluding that Justice Brandeis recognized the force of Holmes' insight and implicitly recanted the position he had taken in *Pennsylvania Coal*. Registering agreement with the Holmes opinion in *Springer*, and avoiding any effort to explain his conversion, was the wise course.

Confirmation of this conclusion may be pregnant in two decisions of Justice Brandeis handed down in the short period during the 1930s after Holmes left the Court and before Brandeis retired. The decisions concerned congressional moratorium legislation known as the Frazier-Lemke Act. As originally enacted the law was declared unconstitutional by unanimous decision.[21] Curiously, in a long opinion there is no reference to due process. However, subsequently, in sustainment of an amended version of the Act[22] the Justice declared "that the effect of the [original] statute in its entirety was to deprive the mortgagee of his property without due process of law."[23] Thus, Justice Brandeis explained the difference between the two statutes—the first was an instance of federal legislation "going too far," whereas the revision fell short of running afoul of due process limitation.

Moreover, in his opinion invalidating the Act, Justice Brandeis captures the Holmes insight that unconstitutionality of enactments does not prevent government from achieving objectives deemed to be in the public interest:

> If the public interest requires, and permits, the taking of property of individual mortgagees in order to relieve the necessities of individual mortgagors, resort must be had to proceedings by eminent domain; so that, through taxation, the burden of the relief afforded in the public interest may be borne by the public.[24]

However, a reading of the passage in which this statement appears seems to ground the finding of a taking in the taking clause rather than, as Justice Holmes foresaw, in the due process clause. To conclude otherwise would be baseless inasmuch as the Brandeis invalidating opinion proceeds without mention of due process. Thus Justice Brandeis, for all his acuity, never fully accepted Holmes' second fundamental proposition of constitutional design enunciated in *Pennsylvania Coal Co. v. Mahon*.

Four decades elapsed before a factual pattern again demanded, of a Court "under new management," the consideration of Holmes' two basic constitutional propositions. The case was *San Diego Gas & Electric v. San Diego*,[25] in which the majority avoided decision, dismissing for lack of finality in the judgments of the California courts. Disagreeing on this technical question of federal jurisdiction, Justice Brennan for four dissenters faced the utility's claim that there had been a taking which required just compensation. Asserting that analysis must commence

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21. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555 (1935).

22. Wright v. Vinton Branch of the Mountain Trust Bank, 300 U.S. 440 (1937).

23. *Id.* at 457.

24. Louisville Joint Stock Land Bank v. Radford, 295 U.S. 555, 602 (1935).

25. 450 U.S. 621 (1981). In *San Diego*, rezoning by the city of San Diego had thrown into a category of "open-space" much of a parcel of land the company had bought in anticipation of construction of a nuclear plant. This category was restricted essentially to parkland hopefully to be purchased with proceeds from a bond issue. The bond issue had failed to win voter approval, leaving the parcel of no usable value to the company. There ensued a suit in inverse condemnation brought by the company that alleged a taking of its property without just compensation in violation of the federal and California constitutions. The remedies sought were damages, mandamus, and declaratory relief.

with reaffirmance of "Justice Holmes' opinion for the Court in *Pennsylvania Coal Co. v. Mahon*,"[26] Brennan avoided the verbal trap that had misled Brandeis and Stone. "[O]nce a court finds that a police power regulation has effected a 'taking,' "[27] a remedy is owed to the aggrieved. He had earlier identified due process as the limiting principle bounding the police power.[28] He thus demonstrated the capacity to grasp the first of Holmes' fundamental propositions of constitutional dimension—that the power of police is not limitless but subject to due process restraint when government goes too far.

For Justice Brennan the problem in *San Diego* was the appropriate remedy for the taking he acknowledged. In *Pennsylvania Coal* the Court had invalidated the Kohler Act by invoking the traditional remedy of invalidation for due process taking. But Justice Brennan reasoned that invalidation for regulatory taking is not always satisfactory; payment of proper compensation may be essential for effective relief. The Justice, thus, saw in the constitutional scheme for regulating the police power a place for due process but only with reference to remedy, not substance; the constitutional provision for eminent domain was sufficient in itself for the task at hand.

He missed the Holmes insight on the substantive issue of the relation of the due process clauses and the taking clause. Holmes' vision was of due process as the determinant of what constituted a "taking" of private property, just compensation as the price government must pay if it persists. I lay Brennan's failure to grasp the functional interplay of due process and taking to senseless refusal of the reconstructed Court to recognize economic due process as a viable constitutional principle. This perverseness that denies him insight into the two clauses functioning in tandem, each fulfilling its unique office in a unitary relationship, is both surprising and disappointing in light of his grasp of the first Holmesian proposition.

In 1987, the Court returned to the issue of the relationship between police power and due process. On its facts the litigation in *Keystone Bituminous Coal Association v. DeBenedictis*[29] appeared to be a replay of *Pennsylvania Coal Co. v. Mahon*. The Kohler Act had been replaced by the Subsidence Act of 1966 prohibiting bituminous coal mining which would cause subsidence damage to three classes of surface structures overlying or in proximity to a mine: public buildings and noncommercial structures generally used by the public; dwellings used for human habitation; and cemeteries and public burial grounds. For a bare majority, Justice Stevens sustained the newer legislation by distinguishing Holmes' invalidation of the earlier anti-subsidence law of the state.

The basis for distinction was said to be the clear concern of the Pennsylvania legislature in the Subsidence Act for the health, safety, and general welfare of the public, whereas the Kohler Act served only private interests and so could not be sustained as an exercise of the police power. To the Court, this is the key to the

26. *Id.* at 649.
27. *Id.* at 658.
28. Allied Structural Steel Co. v. Spannaus, 438 U.S. 234, 251 (1978) (Brennan, J., dissenting).
29. 107 S. Ct. 1232 (1987).

difference in the two situations—the newer law is within the police power, as though this finding is ipse dixit determinative of constitutionality. This premise that a showing of legislative concern for the public interest is sufficient to bring an enactment within constitutional limits in effect makes the police power limitless. To the contrary was the insight of Holmes that governmental regulation is within valid limits only when power has been tested against limitation in the crucible of due process. The genius of Holmes lay in comprehending that only if, on balance, public interest legislation does not "go too far" in destruction of private property, it is a valid exercise of the police power, not a void taking.

The advance in understanding that Brennan had achieved respecting the relationship of police power and due process was gone amid *Keystone*'s reliance upon the erroneous perception spawned by *Mugler* and *Schoene*. Some hesitancy in rejecting Holmes' first thesis is apparent from the cautionary statement in the majority opinion that "we need not rest our decision on this factor alone, because petitioners have also failed to make a showing of diminution of value sufficient to satisfy the test set forth in *Pennsylvania Coal* and our other regulatory takings cases."[30] Full confidence in their assertion that exercises of the police power can never effect a taking would not have necessitated resort to a crutch to bolster a holding of constitutionality.[31] One wonders whether the cautionary statement was occasioned by Justice Brennan referring in Conference to his enlightenment in *San Diego*.

Later in 1987, came the landmark decision in *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*.[32] On acreage located in Mill Creek Canyon, purchased in 1957, First Church had developed and operated a campground, known as Lutherglen, as a retreat center and a recreational area for handicapped children. Twenty years later a disastrous forest fire denuded the hills upstream from Lutherglen, followed by flooding in Mill Creek that demolished the entire project. In response to this flooding the County of Los Angeles adopted an Interim Ordinance forbidding any construction or reconstruction within designated boundaries of the Canyon which included the First Church property. The ordinance was made effective immediately because the county deemed speedy action was "required for the immediate preservation of the public health and safety . . . ."[33] First Church promptly filed a complaint in the California courts, seeking damages on two counts for the loss of use of Lutherglen.

Amid complicating questions regarding federal jurisdiction and appropriateness of remedy, a majority of six, including Justice Brennan, in an opinion by Chief Justice Rehnquist, found a taking which required compensation by the county under the taking clause as absorbed into the due process clause of the fourteenth amendment. That the Interim Ordinance was adopted to safeguard "the public health and safety" did not, in the Court's view, set at naught the Church's claim of an unlawful taking. For the first time a majority seemed to come close to reaffirming the

30. *Id.* at 1246.

31. The weakness of the crutch is exposed *infra* text Part III, in identifying the criteria of taking under due process.

32. 107 S. Ct. 2378 (1987).

33. *Id.* at 2382.

"established doctrine" of Holmes in *Pennsylvania Coal* that if a regulation of private property "goes too far it will be recognized as a taking." This marks significant advancement in constitutional understanding with respect to the relationship between police power and due process. The power of police, although broad, is not without some limit defined by due process.

Disappointingly, an earlier passage in the prevailing opinion prevents an unqualified assertion that Holmes' position had finally been totally accepted. Left open is the question "whether the county might avoid the conclusion that a compensable taking had occurred by establishing that the denial of all use was insulated as a part of the State's authority to enact safety regulations."[34] The hedge seems to be in reaction to an assertion of Justice Stevens, dissenting, with which Justices Blackmun and O'Connor agreed, that the Court "does not, and could not under our precedents, hold that the allegations sufficiently alleged a taking or that the County's effort to preserve life and property could ever constitute a taking."[35] This means that one-third of the Court remains in need of conversion. Misguided precedents die hard!

The majority opinion in *First Church* continues in the path of Holmes' reasoning in *Pennsylvania Coal* by making explicit what was previously implicit: When a regulation goes so far as to constitute a taking, thus violating due process, the offending government has the option either to abandon its untoward assault upon proprietary rights or to resort to "the constitutional way of paying for the change"[36] provided that change comports with public use. But at this point the Court jumps the Holmes track by assuming that the constitutional requirement of just compensation also provides the test of taking. Holmes had seen that the taking clause is but declaratory of the circumstances in which government can lawfully act if it opts to proceed rather than abandon its quest.[1] Determination that the regulation in question constitutes a taking is the function of due process. Because of the continuing nonsense that economic due process is *verboten*, the Court fails to grasp the proper interplay between the due process clause and the taking clause.

The price of Court avoidance of expropriative due process is bad jurisprudence. The concept of "taking" associated with the taking clause is physical appropriation of land. Title is transferred; ownership shifts from former private hands to public domain. The process is known historically as eminent domain. It was semantically difficult for the Court to extend "taking" to the taking of intangible property rights in air space.[37] Temporary takings presented even greater difficulty.[38] Indeed, viewed from perceptions associated with judicial treatment of the taking clause, a temporary taking is almost a contradiction in terms; there is no permanence in the transaction. Thus, the Court in *First Church* is forced to strain at precedent in order to base on the taking clause its holding that compensation is owing for governmental denial of the

34. *Id.* at 2384–85. It is noteworthy that *Muglar v. Kansas* is the earliest of three supporting citations.

35. *Id.* at 2393.

36. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 416 (1922).

37. United States v. Causby, 328 U.S. 256 (1946).

38. Kimball Laundry Co. v. United States, 338 U.S. 1 (1949); United States v. General Motors Corp., 323 U.S. 373 (1945).

use of Lutherglen for a period of time. Excessive government regulation, as contrasted with governmental condemnation, does not fit well under the umbrella of the taking clause.

How much more unconstrained and compelling would taking decisions be under due process. In centuries of litigation English and American courts have examined the principle of expropriative due process in search of its kernel of substantive content. All manner of legislative "tranfers" from A to B have been subjected to testing for taking. The test of due process taking resists categorical definition: whether a taking has occurred must be determined by application of pertinent criteria to the unique facts of each case. Once again *Pennsylvania Coal Co. v. Mahon* provides the framework for constitutional clarifications.

III. Criteria of Due Process Taking

In that seminal decision of 1922 Holmes, disagreeing with Justice Brandeis, stressed the magnitude of the taking from the Pennsylvania Coal Company to the benefit of the Mahons by operation of the Kohler Act. In a phrase, "the extent of the taking is great."[39] Yet this emphasis is immediately followed by the statement, suggesting as well qualitative considerations, that the statute "purports to abolish what is recognized in Pennsylvania as an estate in land—a very valuable estate—and what is declared by the Court below to be a contract hitherto binding on the plaintiffs."[40] And pervading the opinion is an emphasis upon the high level of business ethics displayed by the coal company in its relationship with the Mahons. Analysis of these qualitative and quantitative factors, separately and then in combination, determines whether taking in violation of due process has occurred.

A. *Quantitative Considerations*

The quantitative factor of magnitude can range from alpha to omega. As a generalization, the less the magnitude of interference or deprivation, the less the probability of due process taking on quantitative grounds.

1. *Zero Taking*

Illustrations of zero magnitude readily come to mind. The Court, in *Dayton-Goose Creek Railway v. United States*,[41] found no unconstitutionality in the recapture provision of the Transportation Act of 1920 which required that one-half of the "excess earnings" of the financially stronger railroads be paid over to the Interstate Commerce Commission for distribution to the weaker railroads in support of their economic rehabilitation. To the claim of a deprivation of substantive due process by taking from A (stronger railroad) for the benefit of B (weaker railroad), the Court

39. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414 (1922).
40. *Id.*
41. 263 U.S. 456 (1924).

answered in effect that neither complaining carriers nor shippers were the worse off for the strengthening of the weaker roads to everyone's gain.

Understandably, the Millers in *Miller v. Schoene*,[42] earlier considered, thought it clear enough that property had been taken unlawfully from them; their ornamental red cedars had been cut down by the state entomologist. Yet in dollars the fallen timber was of greater worth than the standing trees, and the land on which they had grown was more valuable without them. In short, the Millers had been deprived, for the good of the apple industry of Virginia, only of aesthetic, not monetary, value.

Two instances of no monetary deprivation date from the period of the Great Depression. *Gelfert v. National City Bank*[43] sustained a New York law that in application denied a deficiency judgment to a mortgagee who by its bid at foreclosure sale regained the security for the loan at a market value at least equal to the face amount of the debt. Shortly thereafter, in *Wickard v. Filburn*,[44] Farmer Filburn was equally unsuccessful in his claim of an invalid taking where, by virtue of the operation of the Agricultural Adjustment Act of 1938, he was "able to market his wheat at a price 'far above any world price based on the natural reaction of supply and demand.' "[45]

Lochner v. New York,[46] invalidating a ten-hour workday limit for bakers, and *Adkins v. Children's Hospital*,[47] striking down a minimal wage underpinning for hospital employees, were incorrectly decided. In neither instance was there any amount of loss to A for B's advantage because, at the levels set, the increased productivity resulting from the legislation at least equaled the added labor costs of the employer. This was demonstrated by the "Brandeis Brief" developed by Louis Brandeis for Oregon's successful challenge of *Lochner* in *Bunting v. Oregon*,[48] and continued by Felix Frankfurter in the unsuccessful effort to sustain the District of Columbia's minimum wage law.

At current federal levels of maximum hours and minimum wages under the Fair Labor Standards Act upheld in *United States v. Darby Lumber Co.*,[49] there is a question whether magnitude of deprivation remains at zero. Occasional talk of a thirty-hour week and mounting pressure for a major increase in the minimum wage would surely implicate some reduction in the value of business ownership. It is contended by opponents that such restricted levels of hours and wages would lead industry to refuse to offer employment or would force industry to bear heavy labor costs with no offset save for opportunities to pass along the burden through increased consumer prices. In such circumstances, justification of factual taking would tend to shift from the traditional constitutional protection for private property to a reinterpretation of the Constitution permitting outright redistribution of wealth and income.

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42. 276 U.S. 272 (1928).

43. 313 U.S. 221 (1941).

44. 317 U.S. 111 (1942). In *Wickard*, the Court sustained, as within the congressional power under the commerce clause, regulation of the marketing of wheat "overhanging the market" although never moving in interstate commerce.

45. *Id.* at 131.

46. 198 U.S. 45 (1905).

47. 261 U.S. 525 (1923).

48. 243 U.S. 426 (1917).

49. 312 U.S. 100 (1941).

With the new constitutionalism now pressed by the radical redistributionists, quantitative analysis of the magnitude of transfer from A to B becomes irrelevant.

2. *De Minimis Taking*

Taking in the due process sense does not automatically follow from demonstration of factual taking. There is the area which Holmes colorfully described as "the petty larceny of the police power."[50] It is when, to extend the metaphor, grand larceny is committed that invalidity results. The moratorium cases of the Depression are instructive. The Minnesota law, sustained in *Home Building & Loan Association v. Blaisdell*,[51] took from the mortgagee's bundle of property rights only that of immediate repossession after a short period of redemption. Technically the holding was based on the contract clause, which the minority of four Justices insisted had been breached. The majority's reasoning sounded in due process terms, highlighting the flexibility of the due process clause in contrast with the facial absolutism of the contract clause that would tolerate no impairment of the contract obligation.

One year later the original federal moratorium law was unanimously invalidated in *Louisville Joint Stock Land Bank v. Radford*.[52] Although due process was not cited as the ground of the decision, the reasoning was again in those terms and the case later "assigned" to that guaranty. All of the bank's five property rights under Kentucky law were found to have been transferred to Radford; the taking was one hundred per cent in magnitude. Congress then revised the law to "return" three of the five rights in the bank's bundle of sticks.

The new legislation was upheld in *Wright v. Vinton Branch of the Mountain Trust Bank*.[53] Treating the rights as equal in weight, magnitude of deprivation had been reduced by sixty per cent. However, two of the three rights regained by the mortgagee were of special value, protecting the security for the loan until payment of the mortgagor's indebtedness. By conservative estimate the statutory amendment lowered magnitude of deprivation to quite tolerable levels.

Loretto v. Teleprompter Manhattan CATV Corp.[54] recently presented the issue of low magnitude taking. Loretto was the owner of rental real estate to which a cable television company had attached its facilities by authority of a New York law. The installation required one-eighth of a cubic foot of space on Loretto's building. Although the Court majority conceded that the intrusion was minor, it found that the permanent physical attachment to the landlord's premises was an unconstitutional appropriation requiring compensation. The basis of invalidation was the taking clause as read into the fourteenth amendment.

This time selection of the wrong constitutional provision resulted in a wrong decision. Clearly, the facts called for application, not of the rigid rule of the taking clause, but of the flexible principles of fourteenth amendment due process. There was

50. *See* G. GUNTHER, CONSTITUTIONAL LAW 162–67 (10th ed. 1980).
51. 290 U.S. 398 (1934).
52. 295 U.S. 555 (1935).
53. 300 U.S. 440 (1937).
54. 458 U.S. 419 (1982).

a factual taking of sorts, yet nothing approximating expropriation of property offending due process. The Court was mired in its obsessive avoidance of substantive due process of law. It is high time for the Justices to return due process to center stage in takings jurisprudence where it belongs as Justice Holmes had the sagacity to appreciate.

3. *Incomplete Taking*

Partial taking is well illustrated by the case of *Andrus v. Allard*.[55] In the district court, the owners of avian artifacts were successful in their challenge of the Eagle Protection and Migratory Bird Treaty Acts, which prohibited commercial transactions in the relics. The basis of invalidation was the violation of fifth amendment property rights. The Supreme Court reversed:

> The regulations challenged here do not compel the surrender of the artifacts, and there is no physical invasion or restraint upon them. Rather, a significant restriction has been imposed on one means of disposing of the artifacts. But the denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full "bundle" of property rights the destruction of one "strand" of the bundle is not a taking, because the aggregate must be viewed in its entirety.[56]

Admittedly, the right to buy and sell constituted "the most profitable use of appellees' property."[57] However, the owners retained the "rights to possess and transport their property," to "donate or devise the protected birds," and to "exhibit the artifacts for an admissions charge."[58] The factual pattern lent itself to analysis under due process and the argument was so framed in the trial court, but "before this Court the appellees have used the terminology of the Takings Clause."[59] One can surmise why counsel for the owners made this shift in strategy; the risk in challenging closed minds was too great for the litigants. Regrettable, indeed, for this would have been an excellent occasion for the Court to terminate its senseless resistance to testing "taking" in terms of due process.

With temporary taking, magnitude seems essentially a function of elapsed time. In *Kimball Laundry Co. v. United States*,[60] the United States brought eminent domain proceedings against the laundry company to acquire the right to temporary use and occupancy of Kimball's plant in order to service military personnel. There was a jury award for annual rental and damage to plant and machinery beyond ordinary wear and tear. Kimball sought additional compensation for diminution in the worth of its business owing to loss of its secret "trade routes." The ouster of some four years' duration was sufficient to destroy their value. By a five to four vote the Court upheld the Kimball claim.

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55. 444 U.S. 51 (1979).
56. *Id.* at 65–66.
57. *Id.* at 66.
58. *Id.*
59. *Id.* at 64 n.21.
60. 338 U.S. 1 (1949).

In *First English Evangelical Lutheran Church of Glendale v. County of Los Angeles*,[61] earlier considered, First Church sought not only the traditional remedy of invalidation of the ordinance, but also compensation for the period during which use was forbidden. Los Angeles County had adopted an ordinance for the devastated area that First Church alleged, and the county did not deny, completely foreclosed the Church from any use of the property where Lutherglen had stood. The Supreme Court majority opinion noted:

> In the present case the interim ordinance was adopted by the county of Los Angeles in January 1979, and became effective immediately. Appellant filed suit within a month after the effective date of the ordinance and yet when the Supreme Court of California denied a hearing in the case on October 17, 1985, the merits of appellant's claim had yet to be determined. The United States has been required to pay compensation for lease-hold interests of shorter duration than this.[62]

Involved was "a considerable period of years," quite in contrast to "normal delays in obtaining building permits, changes in zoning ordinances, variances, and the like . . . ."[63] These facts constituted a sufficient magnitude of deprivation for the majority to find a violation of the taking clause of the fifth amendment as incorporated into the fourteenth. There was, however, a vigorous dissent.

Thus, instances of both partial taking and temporary taking can range the quantitative scale from minimal to significant. Whether unconstitutional taking will be found depends upon a fine-tuned weighing of all pertinent data. For the advocate, nimble diligence is the price of success. Due process should provide the test.

4. *Reciprocated Advantage as a Quantitative Factor*

A taking of seeming unconstitutional magnitude quantitatively may on examination prove to be of de minimis proportions because of the presence of a reciprocity of advantage as between A, the alleged loser, and B, the alleged beneficiary. The classic case of *New York Central Railroad v. White*[64] involved the dual question whether either employee or employer was denied due process of law by legislation substituting a workmen's compensation system for common law liability based on fault. The Court concluded that no deprivation of property obtained in either instance because for each party there was provided an adequate substitute right.

In all likelihood the kernel of the concept of reciprocity of advantage came from *Plymouth Coal Co. v. Pennsylvania*.[65] *Plymouth Coal* sustained early legislation requiring that pillars of coal be left on either side of a property line traversing a mine. Later in *Pennsylvania Coal*, Holmes, distinguishing *Plymouth Coal*, said: "That was a requirement for the safety of employees invited into the mine, and secured an

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61. 107 S. Ct. 2378 (1987).
62. *Id.* at 2388.
63. *Id.* at 2389.
64. 243 U.S. 188 (1917).
65. 232 U.S. 531 (1914). *See infra* note 95 and accompanying text.

average reciprocity of advantage that has been recognized as a justification of various laws."[66]

The majority in *Village of Euclid v. Ambler Realty Co.*[67] found a reciprocity of advantage sufficient to counter a claim of due process deprivation. However, it was not clear to three dissenters or to Ambler how comprehensive zoning of the entire village balanced off the financial loss to the realty company from the re-districting of a portion of its previously acquired land. Here, the realty company, A, did not receive a direct, certain reciprocal advantage as was true of the employer and employee in *New York Central.* Ambler Realty's claimed loss of $7,500 per acre could not be discounted to any low level of magnitude on the basis of the quantum of advantage it may have realized from the indirect benefits of comprehensive zoning. The decision is shaky on its justification.

Reliance on reasoning reminiscent of the concept of reciprocity of advantage figured in Court validation of the Congressional Joint Resolution of 5 July 1933 nullifying gold clauses in both private and public contracts. Challenge was based on an asserted violation of due process; the decisions were five to four. In *Perry v. United States*,[68] involving a Liberty Loan Bond issued by the United States, the majority saved the national policy by finding that while there had admittedly been a taking, Perry was entitled to no recoverable damages. The reasoning was that although the bondholder was forced to accept devalued dollars in payment, he was enabled to pay *his* debts in the same currency. I continue in my conclusion that this time the end was forced to justify the means.

A trio of recent decisions discloses the Court's continued consideration of the role of reciprocity of advantage in determining magnitude of taking. In the most recent, *Hodel v. Irving*,[69] the Court found "there is something of an 'average reciprocity of advantage,' [citing] *Pennsylvania Coal Co. v. Mahon*, . . . to the extent that owners of escheatable interests maintain a nexus to the Tribe"[70] to which those interests would pass if the statute were constitutionally firm. This fact would weigh "weakly in favor of the statute" and combined with the dubious extent to which any of the owners had " 'investment-backed expectations' in passing on the property" might well result in sustaining the law.[71] However, these considerations were heavily overbalanced by the extraordinary character of the government regulation that weighed in at total magnitude by complete destruction of property interests. *Hodel*, like *Perry*, thus is not helpful in assessing the reciprocity concept as a criterion of due process taking.

66. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

67. 272 U.S. 365 (1926).

68. 294 U.S. 330 (1935).

69. 107 S. Ct. 2076 (1987). In *Hodel*, the Court considered the validity of § 207 of the Indian Land Consolidation Act of 1983, which provided that certain interests in Indian lands would not descend but instead would escheat to the Tribe if the interest represented 2% or less of the total acreage in the tract and had earned its owner less than $100 in the preceding year.

70. *Id.* at 2083.

71. *Id.*

The other two recent cases involved the validity of capping statutes. *Duke Power Co. v. Carolina Environmental Study Group*[72] concerned the Price-Anderson Act which capped at $560 million the amount to be allotted per accident to residents living near atomic power plants should nuclear spill occur. The federal district judge who heard the case discussed the absence of any *quid pro quo* to replace extinguished rights under state tort law. In his judgment no adequate reciprocity was provided by the statutory proviso that, were nuclear damage to exceed the statutory limit, Congress "will take whatever action is deemed necessary and appropriate to protect the public from the consequences of a disaster of such magnitude."[73] He found the federal law invalid as violative of due process of law. However, the Supreme Court reversed.

> The logic of *New York Central* would seem to apply with renewed force in the context of this challenge to the Price-Anderson Act. The Price-Anderson Act not only provides a reasonable, prompt, and equitable mechanism for compensating victims of a catastrophic nuclear accident, it also guarantees a level of net compensation generally exceeding that recoverable in private litigation.[74]

A brave statement, indeed, but the asserted *quid pro quo* offers nowhere near the certainty of reciprocated advantage on which *New York Central* rests. Government advocates in future litigation would be wise not to rely on the "logic" of *Duke Power* in contending that challenged taking is minimal in magnitude by reason of the presence of reciprocity of advantage. The argument's vulnerability lies in the assumed low level of recovery in private litigation and the uncertainty of requisite congressional action.

In the other capping case, *Fein v. Permanente Medical Group*,[75] the Court summarily rejected examination of the reciprocity-of-advantage criterion of due process taking by dismissing appeal from the Supreme Court of California "for want of a substantial federal question."[76] Surely Justice White, dissenting alone, was correct that a substantial constitutional issue was presented.[77] The other Justices knew better; they used this ploy to delay judgment. Perhaps postponement on the merits was wise. State court litigation is perplexing on the question whether preservation of the tort system for recovery of damages for personal injury can offer a meaningful *quid pro quo* for taking, from one injured through the fault of another, a portion of the noneconomic loss awarded in a jury verdict.

The dollar level of a cap, the percentage of the cutback, the relative permanence of the injury, and other considerations necessarily affect the adequacy of the reciprocity. Again under the capping statutes, A is not assured of that direct and certain reciprocal advantage A had with B in *New York Central*. Reciprocity of

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72. 438 U.S. 59 (1978).

73. Carolina Envtl. Study Group v. United States Atomic Energy Comm'n, 431 F. Supp. 203, 205 (W.D.N.C. 1977).

74. Duke Power Co. v. Carolina Envtl. Study Group, 438 U.S. 59, 93 (1978).

75. 474 U.S. 892 (1985).

76. *Id.*

77. *Id.* at 895.

advantage is a slippery concept among the quantitative criteria for testing taking by due process standards.

5. *Total Deprivation*

The clearest instance of quantitative "total taking" is presented where a legislature declares that property theretofore in fee simple ownership of A is by fiat declared to be the property of B. *Bowman v. Middleton*[78] denounced such an enactment as "against common right, as well as against *magna charta.*" Similar determinations invoking state due process of law clauses followed up to the eve of the Civil War. The Supreme Court of the United States in three post-Civil War cases unequivocally declared that such an attempted transfer of title constituted a violation of due process of law.[79] Chief Justice Taney in *Dred Scott v. Sandford*[80] had held violative of due process Section 8 of the Missouri Compromise because it effected a complete transfer of ownership of chattel property. However, repudiation of the holding by ratification of the fourteenth amendment robs the case of weight.

There are two recent instances of unquestioned total magnitude taking. The earlier is *Webb's Fabulous Pharmacies, Inc. v. Beckwith.*[81] There the clerk of a county court, relying on a combination of statute and judicial decree, claimed ownership of the interest on more than $100,000 that had been paid into the court registry pursuant to an interpleader action. The Court held that these monies belonged to the creditors of Fabulous Pharmacies, not to the county. The judgment was nullification of the state action, the traditional remedy for a due process taking. Resting the decision on the taking clause, the Justices continued the nonsense of avoiding dependence on the due process clause in adjudication of alleged deprivation of property rights.

In the more recent Supreme Court decision of *Hodel v. Irving*,[82] there is no confession of error in failing to use due process and, yet, there is a glimmer of hope. The legislative enactment that "effectively abolishes both descent and devise"[83] of certain fractionated interests in land was forthwith declared to be in violation of the fifth amendment. The O'Connor opinion, from which there is no dissent, notes the absence of compensation but it closes by recalling Holmes' statement in *Pennsylvania Coal* that regulations which "go too far" constitute a deprivation of due process of law. That the escheat provision amounted to a taking of total magnitude was unquestioned. One could hope that due process analysis is moving toward center stage in the context of total deprivation.

The determination of whether total quantitative taking has occurred can be difficult. *Keystone Bituminous Coal Association v. DeBenedictis*[84] presented the problem in the face of *Pennsylvania Coal Co. v. Mahon.* The crutch employed by the

78. 1 Bay 252 (C.P.S.C. 1792).

79. Dictum in Davidson v. New Orleans, 96 U.S. 97 (1877); Hurtado v. California, 110 U.S. 516 (1884), flowered into a holding at the end of the century in Missouri Pacific Ry. v. Nebraska, 164 U.S. 403 (1896).

80. 60 U.S. (19 How.) 393 (1856).

81. 449 U.S. 155 (1980).

82. 107 S. Ct. 2076 (1987).

83. *Id.* at 2083.

84. 107 S. Ct. 1232 (1987).

bare majority to uphold the Pennsylvania Subsidence Act was the assertedly slight diminution in value effected by the legislative transfer from the mine operators to the owners of surface interests. "The parties have stipulated that enforcement of the DER's [administrative agency's] 50 percent rule will require petitioners to leave approximately 27 million tons of coal in place"[85] out of a total of over 1.46 billion tons, or "less than 2 percent."[86] Precedent abounds for the proposition that minor appropriations do not require compensation; Holmes' metaphor about the "petty larceny of the police power" could have been invoked in support. Thus, asserts the majority, "*Pennsylvania Coal* does not control this case"[87] because its finding had been "that the Kohler Act made mining of 'certain coal' commercially impracticable";[88] whereas in *Keystone* "it is plain that the petitioners have not come close to satisfying their burden of proving that they have been denied the economically viable use of that property."[89]

But here's the rub! In *Pennsylvania Coal* the pillar coal was the unit of property against which the quantum of taking was measured; inasmuch as the totality of this quantity was denied to the Company the expropriation was total—an invalid taking could be constitutionalized only by the government compensating the owners of the mineral rights. In 1987, the *Keystone* majority insisted that there "is no basis for treating the less than two percent of petitioners' coal as a separate parcel of property"[90] because the basis for measuring the quantum of taking consists of the owners' total "coal interests in western Pennsylvania."[91] The reasonable interpretation of Holmes' reference to mining coal "with profit" is that he was thinking of the pillar coal, the extraction of which the Kohler Act made "commercially impracticable," thus having "very nearly the same effect for constitutional purposes as appropriating or destroying it."[92] But the Third Circuit Court of Appeals in *Keystone* misconstrued the passage and thereby misguided the Supreme Court.

The misconstruction is found in footnote six of the Court of Appeals' opinion[93] and quoted with approval in the prevailing opinion in *Keystone*:

> At first blush, this language seems to suggest that the Court [in *Pennsylvania Coal v. Mahon*] would have found a taking no matter how little of the defendants' coal was rendered unmineable—that because "certain" coal was no longer accessible, there had been a taking of that coal. However, when one reads the sentence in context, it becomes clear that the [*Pennsylvania Coal*] Court's concern was with whether the defendants' "right to mine coal . . . [could] be exercised *with profit*." (emphasis added) . . . Thus, the Court's holding in *Mahon* must be assumed to have been based on its understanding that the Kohler Act rendered the business of mining coal unprofitable. Plaintiffs do not contend that this is the case here.[94]

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85. *Id.* at 1249.
86. *Id.* at 1248.
87. *Id.* at 1240.
88. *Id.* at 1246.
89. *Id.* at 1249.
90. *Id.*
91. *Id.* at 1248.
92. Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 414–15 (1922).
93. *See* Keystone Bituminous Coal Ass'n v. Duncan, 771 F.2d 707, 716 (3d Cir. 1985).
94. Keystone Bituminous Coal Ass'n v. DeBenedictis, 107 S. Ct. 1232, 1249 (1987) (quoting Keystone Bituminous Coal Ass'n v. Duncan, 771 F.2d 707, 716 n.6 (3d Cir. 1985)) (citations omitted).

The Supreme Court omitted the Court of Appeals' citation of *Plymouth Coal Co. v. Pennsylvania*,[95] which Holmes distinguished. In *Plymouth Coal* a requirement that pillars of coal be left in place was held not to constitute an invalid taking because the applicable law required leaving only "a comparatively small portion of the valuable contents of the vein . . . ."[96]

Plymouth Coal does not support the assertion that Holmes in *Pennsylvania Coal* limited unconstitutional taking to instances of unprofitability in the total operations of mine owners. *Plymouth Coal* was a different type of case, where separate owners of mines on each side of a property line were required to leave boundary pillars of sufficient width to prevent the closing of one of the mines from flooding the other that remained in production. The enactment was clearly designed to protect "the safety of the men employed in mining upon either property."[97] Plymouth Coal conceded that in these circumstances the statutory requirement could not be deemed an unreasonable exercise of the police power.

As the minority said, *Pennsylvania Coal* cannot be successfully distinguished from *Keystone*. All the pillar coal was taken in *Pennsylvania Coal*, not profitability *in toto*. By Holmes' standard *Keystone* involved a magnitude of taking, equal to that of the pillar coal, that should have been declared violative of due process of law. Justice Powell's retirement would make no difference in a replay of *Keystone*; he was one of the four dissenters. Only when Justice White realizes on reflection the fallacy gripping the majority can the error of *Keystone* be rectified.

B. *Qualitative Considerations*

In the determination of valid or void "taking," quantitative criteria alone are not determinative; qualitative criteria as well require evaluation. Here again the range can be from alpha to omega.

1. *Economic Interest or Property Right*

The initial question is whether there exists a property right at all. The difficulty of that ascertainment is disclosed in *United States v. Willow River Power Co.*,[98] wherein Chief Justice Stone and Justice Roberts were in disagreement with a majority for whom Justice Jackson spoke. The power company owned land at the mouth of Willow River where it drained into the St. Croix River, a navigable stream. On a site riparian to the St. Croix, the company had erected a hydroelectric plant which provided power to the neighboring area. The United States then constructed the Red Wing Dam on the upper Mississippi, into which the St. Croix flows. The dam caused water to back up into the St. Croix beyond the plant, materially reducing the head of water and thus diminishing the plant's capacity to produce electricity. This forced the

95. 232 U.S. 531 (1914).
96. *Id.* at 540.
97. *Id.*
98. 324 U.S. 499 (1945).

company to supplement its production by purchase from other power sources; for this taking the company demanded just compensation.

The Court majority rejected the claim which had been allowed by the Court of Claims. Declared the majority:

> It is clear, of course, that a head of water has value and that the Company has an economic interest in keeping the St. Croix at the lower level. But not all economic interests are "property rights"; only those economic advantages are "rights" which have the law back of them, and only when they are so recognized may courts compel others to forbear from interfering with them or to compensate for their invasion. The law long has recognized that the right of ownership in land may carry with it a legal right to enjoy some benefits from adjacent waters. But that a closed catalogue of abstract and absolute "property rights" in water hovers over a given piece of shore land, good against all the world, is not in this day a permissible assumption. We cannot start the process of decision by calling such a claim as we have here a "property right"; whether it is a property right is really the question to be answered.[99]

Willow River was decided on the taking clause of the fifth amendment; however, the distinction it drew between "economic interest" and "property right" would seem equally applicable to due process "taking." Thus, in the same year as *Willow River*, *Chase Securities Corp. v. Donaldson*,[100] involved a claim of due process violation on the part of a defendant disadvantaged by legislation lifting the bar of a statute of limitations in pending litigation. Suit was to recover for fraud in a securities transaction.

Reaffirming *Campbell v. Holt*,[101] the Court denied relief. Did defendant have only an economic interest in preventing extension of the period of limitation, or did he have a property right of such dubious quality as not to merit protection? Perhaps it was the latter. This inference could be drawn from the fact that *Campbell* had been limited to instances "where lapse of time has not invested a party to title to real or personal property."[102] At the least it is clear that, within the category of "property rights," the Court is sensitive to the quality of the right as well as to the quantitative factor of magnitude in "taking" questions.

Chase Securities is reminiscent of the early case of *Calder v. Bull*,[103] where the continuing issue of the proper role of the Supreme Court in exercising the power to determine constitutionality was first debated by Justices Chase and Iredell.[104] There a probate court had refused to admit a will to probate, thus entitling the heir to take by intestacy. However, after the time for appeal had expired, a special legislative act granted a new hearing, at which the court of probate reversed its original ruling. Thus done in, the heir cried foul. On review by the Supreme Court, Justice Chase was sorely tempted to grant relief despite the absence of a constitutional base for so doing.

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99. *Id.* at 502–03.

100. 325 U.S. 304 (1945).

101. 115 U.S. 620 (1885).

102. Chase Sec. Corp. v. Donaldson, 325 U.S. 304, 311 (1945) (summarizing the holding of Campbell v. Holt, 115 U.S. 620 (1885)).

103. 3 U.S. (3 Dall.) 386 (1798).

104. *See* F. Strong, *Fundamental Law and the Supreme Court*, in 2 ENCYCLOPEDIA OF THE AMERICAN CONSTITUTION 827 (1986).

"A law . . . that takes property from A and gives it to B: it is against all reason and justice, for a people to entrust a Legislature with such powers: and, therefore, it cannot be presumed that they have done it."[105]

In the end, Chase withstood the temptation, partly because of Iredell's strong caution against invalidation beyond constitutional limit and also because of hesitancy respecting the quality of the heir's claim. Although the size of the estate is not known, the heir clearly had an economic interest in the outcome of the probate proceedings. But more, under the distinction made in *Willow River* he had a property right by reason of the Connecticut laws of inheritance, which supported Chase. Yet at the same time the right lacked substantiality, which would account for Chase's hesitancy.

2. *Expectations as a Property Right*

There are other instances where more than economic interest obtains but, although a factual taking of the property right is present, it does not rise to the level of an unconstitutional taking by reason of infirmity in the quality of the right. *Faitoute Iron & Steel Co. v. City of Asbury Park*[106] is illustrative. There the Court upheld a New Jersey law providing for composition of the debts of municipalities unable to meet their indebtedness because of economic conditions in the Great Depression. The claims of bondholders unhappy with the terms of the law were referred to as "paper rights." Quantitatively, the impact on the bondholders cut deeply into their security, yet given the circumstances the state action was a major thrust of little substance.

A better founded expectation was involved in *El Paso v. Simmons*,[107] which grew out of Texas' major distribution of public land to private ownership. Under the original program, contracts of purchase called for a small down payment and annual payment of interest and principal, and for forfeiture on nonpayment of interest, but for reinstatement of the defaulting purchaser at any time upon payment of delinquent interest provided there were no intervening rights of third parties. However, with discovery of great deposits of oil and gas in Texas, the unlimited reinstatement rights made speculation in land ownership and much litigation inevitable. The result was an "imbroglio over land titles in Texas."[108] In an effort to remedy the situation the legislature amended the law to reduce to five years from date of forfeiture the reinstatement provision that had been without limit in duration.

The amendment was upheld. Constitutionality was formally predicated on the contract clause but reasoned on the basis of due process. The entire operation was a speculative enterprise in landholding with profits realized by purchasers in the nature of a windfall. But as Justice Black insisted in his lone dissent, contract rights had been adversely affected. The decision appeared to turn on the majority's assertion that the promise of long-deferred reinstatement "was not the central undertaking of

105. Calder v. Bull, 3 U.S. (3 Dall.) 386, 388 (1798).
106. 316 U.S. 502 (1942).
107. 379 U.S. 497 (1965).
108. *Id.* at 513.

the seller nor the primary consideration for the buyer's undertaking."[109] Quite understandably, Justice Black found this assertion completely at odds with common knowledge concerning credit buying and selling; the case was much closer on the facts than suggested by the disparity in the voting among the Justices.

In the above decisions the inherent weakness in the quality of the claimed property right lay in the fact that the claimants were attempting to build a case out of dashed expectations. *Calder v. Bull* and *Chase Securities* were especially clear examples: The claims were quite ethereal; on any examination they had little body to them. A further instance of similar import is found in *Market Street Railway v. California Railroad Commission*.[110] The private street railway company, forced into unprofitability by competition from the city's car lines, complained of the price set for sale of the private lines to San Francisco. The Court was unimpressed with the complaint. "The due process clause has been applied to prevent governmental destruction of existing economic values. It has not and cannot be applied to insure values or to restore values that have been lost by the operation of economic forces."[111] Frequently in recent Court opinions there is reference to "reasonable expectations" in testing for the presence or absence of invalid taking.[112]

Contrary results in the two air space cases, if explainable at all, must reflect Court differentiation between expectations of future value and property interests that have somehow, in the eyes of legal contemplation, been reduced to possession. Is A's right yet in embryo or has it by some alchemy been transformed into a vested interest? In *United States v. Causby*,[113] a case of first impression,[114] the facts were that Causby had developed on his small acreage a commercially successful chicken farm. This operation had been destroyed by the repeated incoming and outgoing of military planes based at the Greensboro Airport; the chickens had persisted in dying from fright. The untoward experience served to give substance to Causby's asserted rights in the air space immediately above his land. The Court reasoned that "an easement of flight was taken,"[115] requiring compensation.

In *Penn Central Transportation Co. v. New York City*,[116] the owners of Grand Central Terminal assumed rights of ownership in the air space above. However, no action on that assumption had ensued until a lease to Union General Properties was executed for construction of a multi-story office building over the terminal. But by that time the terminal had been designated a "landmark" under the city's Landmarks Preservation Law, and the commission created by that legislation rejected plans for the project. The Court split six to three, denying relief. Technically, it based decision on the taking clause, yet both majority and dissent argued a mixture of due process

109. *Id.* at 514.

110. 324 U.S. 548 (1945).

111. *Id.* at 567.

112. *See, e.g.*, Energy Reserves Group, Inc. v. Kansas Light & Power Co., 459 U.S. 400, 416 (1983) ("In short, ERG's reasonable expectations have not been impaired by the Kansas Act."); *contra*, Kaiser Aetna Co. v. United States, 444 U.S. 164, 179 (1979) ("expectancies embodied in the concept of 'property'").

113. 328 U.S. 256 (1946).

114. *Id.* at 258.

115. *Id.* at 261–62.

116. 438 U.S. 104 (1978).

and eminent domain precedents. Once again a claim of property right grounded only on a fragile assumption was rejected for its poor quality. Lacking were the investment-backed expectations present in *Causby*.

3. *Interparty Relationship as a Qualitative Factor*

The relationship between A and B has a bearing on the quality of A's claim that a property right of A's has been given to B. This elusive factor has overtones in nuisance, tort, unjust enrichment, and other colorings from private law. In some relationships, fault can be seen in A's conduct; in others, A's behavior can be without blemish insofar at least as B is concerned. The classic illustration of quite different relationships between the parties, having undoubted consequences in judicial reaction, is found in comparison of *Pennsylvania Coal* and *Schoene*. In the former, the facts showed exemplary conduct on the part of the Coal Company in its dealings with the Mahons. In the latter, there was an offensive aspect to the Millers' conduct in hosting in their red cedar trees the cedar rust "balls" that in springtime would release the spores so destructive to nearby apple trees and their fruit. Although the great difference in the magnitude of the taking in the two situations was enough to result in opposite holdings on constitutionality, nevertheless the sharp contrast in the relationship of the parties must have served to clinch the contrary results.

A was tarred with far greater offensiveness in *West Coast Hotel Co. v. Parrish*.[117] The hotel was said to be morally derelict in paying chambermaids wages below cost-of-living levels. Such employers were characterized as unconscionable in forcing taxpayers to make up the difference because the "bare cost of living must be met."[118] A was at fault and B was receiving only what was rightfully due.

In contrast is *Thompson v. Consolidated Gas Utilities Corp.*,[119] a unanimous decision of unconstitutionality announced shortly before *Parrish*. There Texas, first by statute and, that failing, then by administrative action, had attempted in certain circumstances to force vertically integrated oil companies to allow use of their pipelines by non-integrated independent producers. The result would have been to deny A the right to pump its own requirements to meet advantageous marketing contracts. Positing a regime of competitive capitalism, this was rank stealing from A, whose only "offense" was that of engaging in free enterprise. Declared none other than Justice Brandeis: "Our law reports present no more glaring instance of the taking of one man's property and giving it to another."[120]

How different two consecutive terms of the Court can sometimes be! The very next year, New York City's tax on local public utilities was before the Court on a claim of due process deprivation. The proceeds of this tax were to be devoted to reduction in the hardships of Depression unemployment. No evidence was offered that the privately owned utilities were peculiarly to blame for the Great Depression; why saddle them with a heavy tax burden that in all fairness should be borne by all

117. 300 U.S. 379 (1937).
118. *Id.* at 399.
119. 300 U.S. 55 (1937).
120. *Id.* at 79.

taxpayers? Notwithstanding, the enactment was upheld in *New York Rapid Transit Corp. v. City of New York.*[121]

Once the Court found no denial of equal protection, the due process contention was disposed of quite summarily. Justice Brandeis was a member of the majority, thus signaling that he saw a difference in the quality of the property right in the two cases. Seemingly, the explanation lay in the fact that New York City had exercised its taxing power, not its police power. A split Court in *Carmichael v. Southern Coal Co.*[122] had just sustained an Alabama excise tax on private employers to support a state unemployment insurance program. Rejection in *Carmichael* of the insistence that the state law "takes private property from one class for the use of another"[123] was based essentially on the proposition that want of relationship between the subjects and benefits of a tax is not a valid objection to a tax levied for a public purpose.

Such is a given of the unique power to tax, a power essential to providing life-giving "blood" to the body politic. Recall *Citizens' Loan Association v. Topeka,*[124] which suggests that this attribute of the taxing power may attach particularly to public utilities. By implication *Loan Association* indicated no invalidity in imposing taxation for the aid of public utilities because of their uniqueness as part private, part public corporations.

Any possibility that the immateriality of lack of relationship would be restricted to exercises of the taxing power was shattered by *Day-Brite Lighting, Inc. v. Missouri*[125] and *Dean v. Gadsden Times Publishing Corp.*[126] Not only was state police power the basis of constitutionality, but further, A's obligation of community service was not the direct one of paying taxes but the vicarious one of financing the civic duties of the B's employed by A.

No wonder Justice Jackson felt in *Day-Brite* that the limit had been passed by this judicial approval of a shifting of economic burden on flimsy, far-fetched mesmerism. The only explanation of these validations is a socialistic one akin to the dogmatism of the distributionists who would alter minimum wage legislation into a vehicle for progress in their goal of major equalization of wealth and income. In such a milieu, attention to the quality of A's property right in relationship to B is irrelevant.

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121. 303 U.S. 573 (1938).

122. 301 U.S. 495 (1937).

123. *Id.* at 499.

124. 87 U.S. (20 Wall.) 655 (1874). In *Loan Association,* the Court declared taxation for the aid of a private enterprise illegal.

125. 342 U.S. 421 (1952). *Day-Brite* held valid a law requiring an employer to pay employees during released time for voting.

126. 412 U.S. 543 (1973). The Court in *Dean* sustained a law requiring employers to pay employees during jury service.

4. *Vested Interests as Top Quality Property Rights*

It is apparent that property rights can vary widely in quality from the very flimsy to the very substantial. Illustrative of the latter are contract rights, which despite the tenuousness of the contract clause since 1880, rank high qualitatively in the judicial mind. Two decisions of the late 1970s, although by divided vote, disclose the continued strength of contract-based rights. *United States Trust Co. v. New Jersey*[127] held invalid the repeal of a legislative covenant that proceeds of bonds of the Port of New York Authority issued to finance two specified programs would not be diverted to the support of mass transit. In addition, *Allied Structural Steel v. Spannaus*[128] held constitutionally wanting Minnesota legislation that impaired contractual relationships between the company and its employees with respect to a pension benefits plan. Both decisions were awkwardly based on the contract clause. In the latter decision, Justice Brennan insisted in dissent that the issue should have been determined on due process with opposite result.[129]

Through centuries of English and American legal history, rights in land have exceeded even contract rights on the qualitative scale. There are no values the equal of that bundle of strands that constitutes fee simple title to land. One of the Court's latest pronouncements, *Hodel v. Irving*,[130] confirmed this verity. Not only did all Justices find total taking quantitatively in abolition of both descent and devise of lands of Indian ownership, as has been noted; of equal determinativeness was the fact that "the right to pass on property—to one's family in particular—has been part of the Anglo-American legal system since feudal times."[131]

IV. Due Process Remains Far from Center Stage

On the last day of the Court's 1986 Term, the overweening event was Justice Powell's surprise announcement of his retirement from active service. Only the Chief Justice had any foreknowledge; the other seven were taken unaware. As consistent swing Justice, unparalleled since the days of Justice Roberts fifty years before, Powell's decision could be seen as disappointing to both conservative and liberal wings of the Court. However, the greater shock had to be to the latter, for with the President's demonstrated determination to name conservative Justices, the loss of Justice Powell meant the breakup of the group of five, the others of whom give every indication of an attempt to hold on through the end of the Reagan presidency. Significantly, Justice Powell gave those four no opportunity to persuade him to reconsider; his concern was for history's record of his service to the Court, not for perpetuation of a controlling philosophy on the Court.

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127. 431 U.S. 1 (1977).
128. 438 U.S. 234 (1978).
129. *Id.* at 251.
130. 107 S. Ct. 2076 (1987).
131. *Id.* at 2083.

There was, as well, irony for the liberal Justices on this fateful occasion; they lost Justice Powell to the conservative wing, suffering defeat on a vote of five to four. The case was *Nollan v. California Coastal Commission.*[132] The Nollans had leased beach-front property, on which stood a bungalow, with an option to purchase. Shoreward, the lot extended beyond an eight-foot concrete seawall to the historic mean high tide line. To exercise the option the Nollans were required to replace the bungalow with a three bedroom, two-story standard house. For permission thus to rebuild, the Coastal Commission imposed a condition: the grant of a public easement "to pass across a portion of their property bounded by the mean high tide line on one side and the seawall on the other side."[133] This lateral passage over the beach portion of the Nollan property would connect with two public beach areas, one a quarter mile to the north and the other one-third mile to the south. The Nollans brought mandamus to strike the condition as violative of the taking clause incorporated from the fifth amendment into the fourteenth amendment. The Commission resisted.

Nothing said by the Court in *Nollan* advances property due process toward center stage, where it belongs. There were four opinions: that of Justice Scalia for the prevailing five Justices, that of Justices Brennan and Marshall in the leading dissent, the short dissent by Justice Blackmun alone, and the dissent of Justice Stevens in which Justice Blackmun joined. The result is that the Court's understanding of Holmes remained muddleheaded.

Analysis best commences with the vigorous dissent of Justice Brennan. The key to the Brennan position is found in the short paragraph opening Part II: "The fact that the Commission's action is a legitimate exercise of the police power does not, of course, insulate it from a takings challenge, for when 'regulation goes too far it will be recognized as a taking.' *Pennsylvania Coal Co. v. Mahon* . . . ."[134] Here the Justice reiterates his acceptance of Holmes' thesis that the power of police is not limitless. Indeed, he outdoes Holmes by modifying "police power" with the adjective "legitimate." Technically, legitimate police power is police power as bounded by due process and thus, without more, fully "insulated" against invalidity.

But note the next and concluding sentence of the paragraph: "Conventional takings analysis underscores the implausibility of the Court's holding, for it demonstrates that the exercise of California's police power implicates none of the concerns that underlie our takings jurisprudence."[135] Essentially, the Justice insists there is no unconstitutional taking of the Nollans' property. Granted that it is consistent with the position that police power is limited to find on given facts that no "taking" has occurred. Nevertheless, questionable support for such a finding raises doubt whether the major premise is resolutely held.

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132. 107 S. Ct. 3141 (1987).
133. *Id.* at 3143.
134. *Id.* at 3156.
135. *Id.*

It must have been such doubt that provoked Justice Stevens to say: "I like the hat that Justice Brennan has donned today better than the one he wore in *San Diego*, and I am persuaded that he has the better of the legal arguments here."[136] In this view, Justice Stevens was joined by Justice Blackmun, who in his own dissent had muddied the legal waters by declaring that "[t]he governmental action is a valid exercise of the police power, and, so far as the record reveals, has a nonexistent economic effect on the value of appellants' property."[137] In the final footnote at the very end of his opinion, Justice Brennan sought to reconcile his *Nollan* dissent with his position in *First Church* where his proposed constitutional rule announced in *San Diego* was endorsed by six members of the Court.[138]

On examination of Justice Brennan's analysis, his conclusion "that the State has taken no property from appellants"[139] rested on three propositions. These are, in apparent ascending order of significance, (1) reciprocity of advantage to the Nollans in return for the lateral public access across their beachfront; (2) lack of any reasonable expectation on the part of the Nollans of use of their property exclusively for private purposes; and (3) the presence of a reasonable relationship between the permit condition and land-use regulation in the interest of the public.

Reciprocity of advantage receives a paragraph of treatment by the Justice. "Allowing appellants to intensify development along the coast in exchange for ensuring public access to the ocean is a classic instance of government action that produces a 'reciprocity of advantage.' *Pennsylvania Coal*. . . ."[140] But this statement is deceptive in suggesting that Holmes there found any reciprocity of advantage. His reference was to "an average reciprocity of advantage" in the fact pattern of *Plymouth Coal Co. v. Pennsylvania*, which he distinguished in *Pennsylvania Coal*. For Holmes the concept was applicable only in the presence of a direct, in-kind reciprocal, as in *Plymouth Coal*, *New York Central*, and (less closely) *Ambler Realty*.

Since Holmes' time the reciprocity concept has experienced some broadening. Thus in *Hodel* Justice O'Connor saw "something of an 'average reciprocity of advantage'" yet, because the nexus to the Tribe was at best indirect, she found it "weighing weakly in favor of the statute" and heavily outweighed by the magnitude of the intrusion upon property rights.[141] *Perry* and *Duke Power* are probably best understood as instances where the enormous cost of invalidation to the federal government determined the outcome, and yet, even in those cases, the reciprocal was less faint than in *Nollan*. Justice Brennan went far afield indeed when he found "an additional benefit from the Commission's permit condition program"[142] in the fact that the appellants "are able to walk along the beach beyond the confines of their own

136. *Id.* at 3163.
137. *Id.*
138. *Id.* at 3162 n.14.
139. *Id.* at 3160.
140. *Id.* at 3158.
141. 107 S. Ct. 2076, 2083 (1987).
142. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3158 (1987).

property only because the Commission has required deed restrictions as a condition of approving other new beach developments."[143]

Treatment of expectation appears at two points in Brennan's dissent. Near the end of Part IA, he observed:

> Where a private landowner has had a reasonable expectation that his or her property will be used for exclusively private purposes, the disruption of this expectation dictates that the government pay if it wishes the property to be used for a public purpose. In this case, however, the State has sought to protect *public* expectations of access from disruption by private land use.[144]

Later, in Part II, Justice Brennan declared:

> With respect to appellants' investment-backed expectations, appellants can make no reasonable claim to any expectation of being able to exclude members of the public from crossing the edge of their property to gain access to the ocean. It is axiomatic, of course, that state law is the source of those strands that constitute a property owner's bundle of property rights.[145]

As a criterion of "taking," expectation is of doubtful weight unless investment-backed. In this case Justice Brennan insists there is no basis whatever even for expectation because of a provision in the California Constitution of 1879. That provision "explicitly states that no one possessing the 'frontage' of any 'navigable water in this State, shall be permitted to exclude the right of way to such water whenever it is required for any public purpose.'"[146] It is therefore the public's expectations that are "settled" which the private landowners threaten to disrupt.

However, the Brennan contention holds true only if the state constitutional provision can be construed to embrace *lateral* access to water. Such construction is highly questionable in light of the wording. A public right *to the water*, taken in historical context, is strongly suggestive of direct access to water from landlocked parcels of property, absent authoritative state-court interpretation. Justice Scalia for the majority is on sound ground in challenging the doubtful reading. Of "a number of difficulties with [Brennan's] argument," the most obvious is that "the right of way sought here is not naturally described as one *to* navigable water (from the street to the sea) but *along* it; it is at least highly questionable whether the text of the California Constitution has any prima facie application to the situation before us."[147]

Part I of the Brennan dissent opens and closes on the issue of relationship. However, in contrast with the personalized character of relationship, or lack thereof, between A and B seen in earlier cases considered in Section III, nexus here is debated in terms of connection between the permit condition and public access, visual and psychological, to the ocean. This stance is found in two passages:

> Appellant's proposed development would reduce public access by restricting visual access to the beach, by contributing to an increased need for community facilities, and by moving

143. *Id.*
144. *Id.* at 3154.
145. *Id.* at 3158.
146. *Id.* at 3158–59.
147. *Id.* at 3145.

> private development closer to public beach property. The Commission sought to offset this diminution in access, and thereby preserve the overall balance of access, by requesting a deed restriction that would ensure "lateral" access [enabling the public to pass and repass along the dry sand parallel to the shoreline].[148]

Citing *Day-Brite Lighting*, and two other precedents of like extreme, Justice Brennan then insisted that the connection need be only *rational*. Applying this low level nexus, which experience with the facile term means little short of no relationship at all, he insisted:

> [t]he Court is therefore simply wrong that there is no reasonable relationship between the permit condition and the specific type of burden on public access created by the appellants' proposed development. Even were the Court desirous of assuming the added responsibility of closely monitoring the regulation of development along the California coast, this record reveals rational public action by any conceivable standard.[149]

It must have been the tenuousness of these propositions, individually and in combination, that led Justices Stevens and Blackmun to wonder if Brennan had not in effect retracted from his thesis, articulated in *San Diego* and adhered to in *First Church*, that state police power is subject to constitutional limitation protective of rights in private property. If Justice Brennan has slipped back from the high ground he had attained, Holmes' thesis of a bounded police power continues in serious jeopardy.

For the majority Justice Scalia rejected Justice Brennan's primary argument on relationship. "Rewriting" it "to eliminate the play on words makes clear that there is nothing to it."[150] Continuing,

> [I]t is quite impossible to understand how a requirement that people already on the public beaches be able to walk across the Nollans' property reduces any obstacles to viewing the beach created by the new house. It is also impossible to understand how it lowers any "psychological barrier" to using the public beaches or how it helps to remedy any additional congestion on them caused by construction of the Nollans' new house. We therefore find that the Commission's imposition of the permit condition cannot be treated as an exercise of its land use power for any of these purposes.[151]

The new Justice took comfort in the fact, citing endless state cases, that his conclusion was consistent with that of all other courts, save those of California.

However, Justice Scalia disputed only the application of the rational basis test; he did not challenge outright the flimsy standard itself. Rather, he contended that the criteria for "taking" under the taking clause differ from those applicable with the due process clauses. "But there is no reason to believe (and the language of our cases gives some reason to disbelieve) that so long as the regulation of property is at issue the standards for takings challenges, due process challenges, and equal protection challenges are identical. . . ."[152] The accuracy of this statement is open to question; there has been a Court tendency to cross cite, not categorize, holdings, as *Penn*

148. *Id.* at 3152.
149. *Id.* at 3156.
150. *Id.* at 3149.
151. *Id.*
152. *Id.* at 3147 n.3.

Central[153] amply attests. Moreover, the distinction is unfortunate on at least two counts.

First, determining taking by reference to the taking clause introduces an undesirable rigidity into takings jurisprudence. Because eminent domain historically connotes physical expropriation of land by government, emphasis on literal transfer of title distorts judgment as to what criteria are relevant in deciding whether factual taking rises to the level of invalid "taking." Where the test should be flexible it is all but inflexible. *Loretto*[154] was a bad decision for this very reason. Yet Justice Scalia employs that case as precedent for invalidation of the directive of the Coastal Commission. "We think a 'permanent physical occupation' has occurred, for purposes of that rule, where individuals are given a permanent and continuous right to pass to and fro, so that the real property may continuously be traversed, even though no particular individual is permitted to station himself permanently upon the premises."[155] Justice Brennan had the better precedent in *PruneYard Shopping Center v. Robins*,[156] where the "Court made clear" that "physical access to private property in itself creates no taking problem if it does not 'unreasonably impair the value or use of [the] property.' "[157] Earlier consideration in Section III demonstrates the unsatisfactoriness of attempting to determine "taking" by reference to the taking clause.

The second and fundamental difficulty with looking to the taking clause is that on its face it states only what is to transpire should government wish to proceed with its program when that program has been held to constitute an unconstitutional taking. The taking clause does not resolve the question whether or not "taking" has occurred. It is true that an unsophisticated Court lately has attempted to develop precedent for that purpose, but if it would heed the genius of Holmes it would see that from time immemorial it has been due process that has functioned as the test of "taking." By insisting on a distinction between standards for taking clause challenges and those for due process challenges, Justice Scalia destroys the potential for understanding the functional interplay of the two tandem provisions in the fifth (and fourteenth) amendment for protection of private property.

In the present Term the Court returned to the "taking" issue in *Pennell v. City of San Jose*.[158] A rent control ordinance of the city provides that should a landlord raise the rent of a tenant in possession by more than eight percent, the tenant is authorized to lay an objection before a hearing officer. In determining whether the excess is "reasonable under the circumstances" that officer is directed to consider a number of factors, including "tenant hardship," more particularly defined by the ordinance as "an unreasonably severe financial or economic hardship on a particular tenant. . . ." If on balance the officer finds such burden, he is empowered to disallow the entire excess or any portion thereof. A landlord and a landlords' association

153. *See* note 116 and accompanying text.
154. *See* note 54 and accompanying text.
155. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3145 (1987).
156. 447 U.S. 74 (1980).
157. Nollan v. California Coastal Comm'n, 107 S. Ct. 3141, 3157 (1987).
158. 108 S. Ct. 849 (1988).

attacked this provision. Grounds for asserted invalidity were the taking clause, the due process clause, and the equal protection clause.

On first reaction to the Court's response, due process seemed to have gained in posture, for both the majority opinion by the Chief Justice and the partial dissent by Justice Scalia treated due process as relevant to the landlord's claim of invalid taking. For the first time all the Justices who heard argument acknowledged its pertinency. It is true that the due process challenge was rejected in both opinions but this was altogether understandable in the circumstances. Attack had been on the face of the tenant hardship provision; both majority and dissenters were careful to state only that the provision was *not* "facially invalid under the Due Process Clause."[159]

Measured against the criteria of due process taking examined in Part III of this critique, "taking" anywhere near approaching constitutional breach is not present. Landlord and tenant have a long history in the law. While the relationship is close it is contentious in form; conflicting interests are of the very essence of the association. Here, however, there has been no alteration of rights to the detriment of the landlord. There never may be any, but should the future hold this consequence, for the present it lies in pure speculation. Qualitatively, the mere presence in the ordinance of the tenant hardship clause, with no indication of what may transpire under it, generates at most an economic concern for the landlord that lacks any quality of a property right. Quantitatively viewed the landlord claim is even more flimsy. Magnitude is at zero; not one strand of a landlord's bundle of property rights has been severed for transfer to any tenant. Due process is concerned with actuality in legislative or administrative adjustments of proprietary rights in the here and now. Speculation that adverse impact may occur at some later time must await a provocative event.

Alas, further attention to the *Pennell* opinions dashes first hopes of progress in Court recognition of the part that due process should play under the tutelage of Holmes. Due process is accorded relevancy only to be deflated to near irrelevancy. The taking clause is anointed as the controlling judge of whether or not unlawful taking has transpired. The full Court has now accepted the misguided thesis of Justice Scalia in *Nollan* that the "standards for taking challenges" differ from those for "due process challenges"[160] with the former applicable in determining whether a technical taking is of a severity to require government to award just compensation as the price of its exaction.

Justice Scalia, whom Justice O'Connor joined, is more forthright in pedestalling the taking clause. In the very same paragraph, the opening one of his disagreement, he asserts that the tenant hardship provision does not of itself run afoul of due process and yet "effects a taking of private property without compensation in violation of the Fifth and Fourteenth Amendments."[161] The position of the majority is not different on this key point. Their view that the case as presented was not yet ripe for resolution does not obscure the fact that, should administration of the challenged provision precipitate a seeming transfer of the landlord's property to a hardship tenant, the

159. *Id.* at 853 (majority language). The phrasing of the dissent appears *id.* at 859.
160. *Id.* at 859.
161. *Id.* (Scalia, J.,dissenting).

taking issue would be decided under the taking clause. This is clear enough from several passages in the opinion of the Chief Justice. Instance the opening statement reciting disposition of the case below by the California courts[162] and the two paragraphs that follow immediately his turn to consideration of the merits.[163]

Pennell is a devastating setback to realization of Holmes' propositions that it is due process which fixes bounds to the police power and determines when "taking" has gone too far. All the Justices have now undercut the second of his constitutional premises; the first hangs in the balance by virtue of Justice Brennan's uncertain support for it in *Nollan* after earlier championing it with success among a number of his associates.

Due process is thus far from enjoying the center stage in takings jurisprudence which the genius of Holmes would accord it. After sixty-six years of repeated opportunity for comprehension, why do the able minds of sitting Justices fail to embrace the insight Holmes provided in his seminal opinion in *Pennsylvania Coal Co. v. Mahon*? This extended episode is a sad one in the history of an institution respected for its constitutional statesmanship. When the Court manifests an inability or unwillingness to master the Constitution as structured, surely it would be utter folly to allow the Justices an interpretational carte blanche beyond the empowerments and constrictions of a democratically conceived written instrument of fundamental law.

162. *Id.* at 853.
163. *Id.* at 856.